

HARWELL MINING CO.
WILFORD F. MONTGOMERY

IBLA 81-728

81-729

Decided July 22, 1981

Appeals from the decision of the California State Office, Bureau of Land Management, declaring six mining claims abandoned and void. CA MC 60205, CA MC 60206, CA MC 60272 through CA MC 60275.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Evidence: Credibility -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

Where a preponderance of the evidence does not support a finding that all documents necessary to effectuate a filing under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), were timely filed, a decision declaring a mining claim abandoned and void for failure to file timely the required documentation will be affirmed.

3. Administrative Authority: Generally -- Constitutional Law: Generally
-- Statutes

The Department of the Interior, as an agency of the Executive Branch of the Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional.

APPEARANCES: W. T. Elsing, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Harwell Mining Company and Wilford T. Montgomery have appealed the decision of the California State Office, Bureau of Land Management (BLM), declaring six mining claims, CA MC 60205, CA MC 60206, and CA MC 60272 through CA MC 60275, 1/ abandoned and void for failure to file evidence of annual assessment work or notices of intention to hold the claims on or before December 30, 1980, as required by 43 CFR 3833.2-1.

Appellants' statements of reasons are similar. They assert that appellant Montgomery recorded evidence of assessment work for the Volco #1 and #2 claims, CA MC 60205 and CA MC 60206, a notice of intention to hold covering the other four claims at issue plus the Ash Canyon mining claim, CA MC 60271, and various other documents in the San Bernardino County recorder's office on December 3, 1980, and immediately mailed copies of all the documents to BLM. Appellants argue that since some of the documents are in the claim files, BLM must have received the documents now missing. In support of their argument, appellants have submitted the affidavit of appellant Montgomery describing his actions, evidence of assessment work for the Volco #1 and #2 reflecting a San Bernardino county recorder date stamp of December 3, 1980, and an unrecorded copy of an assessment work notice dated December 2, 1980, and labeled "Notice to Hold All proving has not been complete," for the other four claims and Ash Canyon claim. In addition, appellants have submitted the affidavit of Lee Potter who states:

On December 3, 1980, I was at the residence of Mr. W. Frank Montgomery * * * in the afternoon at about 3:00 o'clock on

1/ The mining claims at issue are the Volco #1 and #2 mining claims, CA MC 60205 and CA MC 60206, owned by Harwell Mining Company which obtained them by quitclaim deed from Wilford T. Montgomery on November 19, 1980; the Volco #3 and #4 mining claims, CA MC 60274 and CA MC 60275 owned by Dick Southard (apparently deceased) and Montgomery; and the Ash Point #1 and #2 mining claims, CA MC 60272 and CA MC 60273, owned by 108 Reasources, Ltd., which obtained them by quitclaim deed from Montgomery on December 2, 1980.

that day. Mr. Montgomery returned to his home with reproductions of documents that he had filed with the County Recorder of San Bernadino [sic], California. I saw him sort out the documents and place them in an envelope addressed to the Bureau of Land Management in Sacramento, California. I then drove him to the post office at Fontana, California. He went into the post office with the envelope and came out without it.

Two documents recorded on December 3, 1980, in the San Bernardino County recorder's office were received by BLM on December 8, 1980, and are filed in the case file for mining claims CA MC 60271 through CA MC 60275: an assessment work notice for Ash Canyon, CA MC 60271 and other claims not at issue herein and a quitclaim deed transferring ownership of the Ash Canyon, Ash Point #1, and Ash Point #2 mining claims from Wilford Montgomery to 108 Reasources, Ltd.

Appellants also argue that section 314 of the Federal Land Policy and Management Act, 43 U.S.C. § 1744 (1976) is unconstitutional. They state that "abandonment means voluntary relinquishment of the possession of property by the owner with the intention of terminating his ownership. The very fact that the owner recorded his Assessment Work Notice conclusively establishes that there was no abandonment. Had Congress meant otherwise, it would have used the word 'forfeiture.'"

[1, 2] The claims at issue were allocated in November 1979. Section 314(a)(1) and (2) of FLPMA, 43 U.S.C. § 1744(a)(1) and (2) (1976), and the pertinent regulation, 43 CFR 3833.2-1(c), require that the owner of an unpatented mining claim located after October 21, 1976, shall, prior to December 31 of each year following the calendar year in which the claim was located, file with BLM evidence of annual assessment work performed during the previous assessment year or a notice of intention to hold the mining claim. Failure to file the required instrument is conclusively deemed to constitute an abandonment of the mining claim under section 314(c) of FLPMA, 43 U.S.C. § 1744(c) (1976), and 43 CFR 3833.4(a).

The question before us is whether BLM in fact received the documents pertaining to the six claims and thereafter lost them. This Board has often noted the legal presumption of regularity which attends the official acts of public officers in the proper discharge of their official duties. See, e.g., Phillips Petroleum Co., 38 IBLA 344 (1978); Donald E. Jordan, 35 IBLA 290 (1978); A. G. Golden, 22 IBLA 261 (1975). This presumption is subject to rebuttal by probative evidence. L. E. Garrison, 52 IBLA 131 (1981). In this case, however, we find that appellants have established only that some documents were recorded in the county recording office, some were then sent to BLM, and some were received. The purported notice of intent to hold four of the claims bears no recording office stamp. It lists the Ash Canyon claim which is also listed on the assessment work notice which BLM did

receive. The affidavit of Lee Potter only supports the fact that some documents were sent to BLM; it does not establish what documents were sent. We hold that appellants have not shown by a preponderance of the evidence that BLM received the required documents. Cf. Bruce L. Baker, 55 IBLA 55 (1981); Bernard J. Braker, 54 IBLA 332 (1981); L. E. Garrison, supra.

[3] As to appellants' charge that section 314 of FLPMA is unconstitutional, we reiterate our earlier holdings that the Department of the Interior, being an agency of the executive branch of the Government, is not the proper forum to decide whether an act of Congress is constitutional. Alex Pinkham, 52 IBLA 149 (1981), and cases cited therein. Contrary to appellants' assertion, in section 314 of FLPMA, supra, Congress specifically placed the burden on the mining claimant to show that his claim has not been abandoned by his compliance with the Act's requirements, and any failure to comply produces a conclusive presumption of abandonment. See Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge